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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-1462

Mark White, et al.,
Appellants

v.

Diana Regester, et al.,
Appellees

Mark White, et al.,
Appellants

v.

James Gaskin, et al.,
Appellees

Mark White, et al.,
Appellants

v.

Frank A. Escalante, et al.,
Appellees

Mark White, et al.,
Appellants

v.

Wanda L. Chapman, et al.
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

APPELLANTS' REPLY TO APPELLEES' REGESTER, BERNAL, AND ESCALANTE MOTION TO DISMISS AND IN OPPOSITION TO APPELLANTS' MOTION TO DISPENSE WITH PRINTING

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April, 1974

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF THE CASE

Regester, Bernal, and Escalante, some of the Appellees herein, base their Motion to Dismiss the Appeal of this case exclusively on the allegation that Appellant has failed to comply with Rule 13, Supreme Court Rules of Procedure.

The trial of this matter was before a three-judge federal district court, which handed down its judgment for Appellees on January 28, 1974. Notice of Appeal was filed on behalf of the State of Texas on January 30, 1974. Appellants' Motion for Stay of the judgment of the lower court pending appeal was presented to this Court on January 31, 1974, and granted on February 2, 1974.

Appellants' Jurisdictional Statement was due on April 1, 1974, and was filed with the Clerk of the United States Supreme Court on that date. The Jurisdictional Statement was accepted for record by the Clerk.

Prior to that time, on March 26, 1974, Appellant asked for and received the approval of the office of the Clerk of the Supreme Court for the filing of the Jurisdictional Statement in typewritten form on or before April 1, with printed copies of the Statement to be substituted therefor shortly thereafter. Appellant did

not seek any extension of the April 1 filing deadline, because to do so might have delayed the ultimate disposition of this case. On March 26, 1974, Mr. Schade of the Clerk's Office, advised counsel for Appellant that typewritten copies of the Jurisdictional Statement would be accepted for record on or before April 1, so long as it was understood that appropriate printed copies of the Statement would be substituted therefor shortly thereafter. The Clerk's office made no requirement that any other motions accompany or precede the typewritten Jurisdictional Statement. (See Exhibit A). Confirming this telephone agreement, Appellant wrote the Office of the Clerk on March 26, 1974, outlining the substance of the agreement, and requesting immediate response from the Clerk's office in the event the agreement was incorrectly or incompletely stated. (See Exhibit B). No such response was received from the Clerk, and Appellant proceeded on the basis of the March 26 agreement. On April 1, 1974, at the time the ten typewritten copies of the Jurisdictional Statement were accepted for record by the Clerk's office, Mrs. McFarland of the Clerk's Office advised Appellants' counsel that the Jurisdictional Statement had been docketed, but that a Motion to Dispense with Printing should also be filed with the Court, and that the $100 fee should be filed with the Court. The Appellant offered to have the Motion completed and filed with the Clerk on that day, and also offered to make arrangements for the filing of the $100 fee on that day, but was advised by the Clerk that the Motion and the fee could be forwarded through

the normal mail delivery from Austin, Texas, and that receipt of neither on April 1 was necessary to the docketing of the appeal. (See Exhibit C). The $100 fee and the Motion to Dispense were received and filed by the Clerk on April 3, 1974, and on April 10, 1974, forty printed copies of the Jurisdictional Statement were delivered to the Clerk.

ARGUMENT

The jurisdiction of the Supreme Court attaches upon the timely filing of a Notice of Appeal, and docketing under Rule 13 is not jurisdictional in nature. Appellant filed its Notice of Appeal in a timely fashion, only two days after the entry of the judgment below. Appellees' suggestion that this entire appeal be dismissed because Appellant, with the agreement of the Clerk of the United States Supreme Court, filed its Jurisdictional Statement in typewritten form on April 1, 1974, followed nine days later by the appropriate number of printed copies, is without merit. Appellees have cited no case wherein an appeal has been dismissed by this Court on such grounds. All of the cases relied upon by Appellees involve situations in which no Jurisdictional Statement or Petition for Certiorari were filed in *any* form within the sixty or ninety day periods provided by Rule 13, not, as here, situations in which the appropriate appellate brief was accepted for record by the Clerk within the appropriate time period. In the case

most heavily relied upon by Appellees, *Snider v. Allstate Administrators, Inc.*, ____ U.S. ____, 94 S.Ct. 771 (1974), the Appellant had apparently sought to totally dispense with the printing of its Petition for Certiorari, rather than, as here, simply seeking to briefly delay the filing of printed copies, with typewritten copies being timely filed in the meantime. The Court in *Snider* suggested that the prognosis for such motions which did not include any attempt to proceed in forma pauperis under Rule 53, is quite poor. The Court did not speak directly to the issue of Motions to Dispense filed for the limited purpose of postponing the filing of printed copies for a very brief period of time while typewritten copies are filed within the time allowed by Rule 13. The Court indicated that in the situation of motions such as in the *Snider* case, where the Appellant sought to dispense entirely with the necessity for filing forty copies, that the Clerk was directed by the Court not to receive or accept for record a Petition for Certiorari or the document subject to Rule 39, which failed to conform to the requirements of that Rule. In the instant case, the Jurisdictional Statement of Appellant was accepted for record by the Clerk.

Appellees' suggestion that they may be harmed by the filing of the Jurisdictional Statement in typewritten form, because they "wish to cite to the arguments of the State in the Jurisdictional Statement," and "must wait until the printed document is available for such reference in order to avoid confusion" is groundless. Appel-

lees will have nearly three weeks from receipt of the printed Jurisdictional Statement to note the pages on which the various arguments appear in the Jurisdictional Statement, prior to the filing of their reply.

Facing difficulties and delays in the printing of its Jurisdictional Statement, Appellant sought not to delay the disposition of this case, but rather to meet the schedules of the Court as laid down in its Rules. Appellant sought the advice of the Clerk of the Court in meeting these schedules, and acting always upon the advice and with the agreement of the Clerk, proceeded as outlined above. Appellees have in no way been harmed by these procedures, and the procedures are in accordance with the rules and the cases thereunder. Appellees' suggestion that this important litigation be decided upon an improper construction of Rule 13, without a determination by this Court of the important and far reaching substantive issues of this Appeal, is without merit.

CONCLUSION

For the reasons stated above, Appellants respectfully pray that Appellees' Motion to Dismiss and in Opposition to Appellants' Motion to Dispense with Printing be in all things denied.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant Attorney General

ELIZABETH B. LEVATINO
Special Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of this Court, hereby certifies that a copy of the foregoing motion has this the _____ day of April, 1974, been served upon each counsel of record for Appellees in accordance with Rule 33 of this Court, by depositing the same in the United States mailbox, with first-class postage, prepaid, addressed to said counsel at their post office addresses.

LARRY F. YORK

EXHIBIT A

STATE OF TEXAS§
COUNTY OF TRAVIS §

AFFIDAVIT OF DANIEL O. GOFORTH

My name is Daniel O. Goforth. I am an attorney licensed to practice by the State of Texas and am employed as Staff Legal Assistant to the Attorney General for the State of Texas. On March 26, 1974, pursuant to a request of the First Assistant Attorney General Larry F. York and Special Assistant Attorney General Elizabeth B. Levatino, I talked by telephone with Mr. Schade with the Office of the Clerk of the Supreme Court of the United States about the procedures necessary for filing typewritten copies of the Jurisdictional Statement due in this case on April 1, 1974, pending substitution of printed copies upon completion of the printing process. After I explained to him that we desired to file a typewritten copy of the Jurisdictional Statement on the date the Statement was due and to substitute printed copies shortly thereafter, Mr. Schade informed me that such a procedure was permissible and that the brief would be considered timely filed upon receipt by the Court of the typewritten copies.

No mention was made of the necessity for filing a Motion to Dispense with Printing.

On the afternoon of the day I talked with Mr. Schade, I dictated a letter for Mr. York's signature confirming the contents of my discussion with Mr. Schade. The letter was sent over Mr. York's signature to Mr. Schade on the afternoon of March 26, 1974.

DANIEL O. GOFORTH

SUBSCRIBED AND SWORN TO before me this _____ day of April, 1974.

Notary Public in and for
Travis County, Texas

VIA AIR MAIL

EXHIBIT B

March 26, 1974

Mr. Schade
Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Mark White, et al. v. Diana Regester, et al.;
Mark White, et al. v. James Gaskin, et al.;
Mark White, et al. v. Frank A. Escalante, et al.;
Mark White, Jr., et al. v. Wanda L. Chapman, et al.;
In the Supreme Court of the United States, October Term, 1973

Dear Mr. Schade:

This is to confirm your agreement in our telephone conversation this morning to file typewritten copies of our Jurisdictional Statement in the above captioned matter pending substitution of printed copies of the Statement. Several copies of the Statement in typewrit-

ten form will be filed with the Court on April 1, 1974, the due date for the Jurisdictional Statement. Printed copies of the brief will be substituted for the typed copies a few days thereafter.

If the above is not your understanding of our agreement, please notify us.

Thank you for your kind assistance in this matter.

Very truly yours,

Larry F. York

LFY:bm

EXHIBIT C

STATE OF TEXAS §
COUNTY OF TRAVIS §

AFFIDAVIT OF ELIZABETH LEVATINO

I am a lawyer licensed to practice by the State of Texas and am employed as an Assistant Attorney General for the Attorney General of Texas. I am a counsel of record for Defendants Mark White and Dolph Briscoe in the litigation entitled Regester, et al. v. White, et al. Pursuant to this litigation, I participated in the preparation of the Jurisdictional statement of the Appellants to be docketed with the United States Supreme Court on April 1, 1974, together with Mr. Larry York, First Assistant Attorney General of the State of Texas. On March 26th pursuant to our request, Mr. Daniel Goforth, an Assistant Attorney General in our office, was directed to contact the Clerk of the United States Supreme Court to inquire as to the possibility and propriety of submitting typewritten copies of the Jurisdictional Statement on April 1, 1974, with the substitution of printed copies therefor shortly thereafter. Mr. Goforth informed us that such a procedure was acceptable and proper. I therefore proceeded to have the Jurisdictional Statement completed and deposited with a commercial airline for pickup and delivery in Washington, D.C. on

April 1, 1974. Assistant Attorney General Frank Cooksey delivered the Jurisdictional Statement to the Clerk of the Supreme Court on that date.

In the afternoon of April 1, 1974, I was asked to return a phone call received by Mr. York from Mrs. McFarland with the Clerk's Office in the United States Supreme Court. Mrs. McFarland informed me that she had received the Jurisdictional Statements and that they had been docketed. However, she asked that we submit a Motion to Dispense with Printing Pending Substitution of the Printed Copies for the records of the Court. She also indicated that we had failed to enclose the check for $100 for docketing the case, and it appeared that a copy of the Notice of Appeal filed January 30, 1974 with the United States District Court for the Western District of Texas, Austin Division, did not appear in either the Jurisdictional Statement or the separately printed Appendix to the Jurisdictional Statement. I told Mrs. McFarland that our office had been unaware of the necessity for the Motion to Dispense with Printing in this particular situation but we would immediately comply with her request. I then asked her if it was necessary for these materials to reach the Supreme Court on April 1, 1974, the docketing deadline. She informed me that the appeal had been docketed and it would not be necessary for the materials to reach her office on April 1. She stated that the Motion to Dispense with Printing and the $100 check could be placed in the mail and delivered through that

method. She also informed me that the Notice of Appeal could be printed with the Jurisdictional Statement which we would be substituting for the typewritten copies shortly. I then proceeded to have the appropriate motions prepared, and obtained the filing fee, and placed these items in the mail on April 1, 1974.

ELIZABETH LEVATINO

SUBSCRIBED AND SWORN TO before me this ____ day of April, 1974.

Notary Public in and for
Travis County, Texas